

1 DEIRDRE DES JARDINS
145 Beel Dr
2 Santa Cruz, California 95060
Telephone: (831) 423-6857
3 Cell phone: (831) 566-6320
Email: ddj@cah2oresearch.com

4 Principal, California Water Research
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6
7 **BEFORE THE**
8 **CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

9 HEARING REGARDING PETITION
10 FILED BY THE DEPARTMENT OF
WATER RESOURCES AND U.S. BUREAU
11 OF RECLAMATION REQUESTING
CHANGES IN WATER RIGHTS FOR THE
12 CALIFORNIA WATERFIX PROJECT

JOINDER IN REQUESTS BY LAND ET
AL. AND SAN JOAQUIN COUNTY ET.
AL., AND BY CONTRA COSTA COUNTY
ET. AL.

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15 Deirdre Des Jardins, principal at California Water Research (“California Water
16 Research”) hereby joins in the Request for Modification or Reconsideration of Ruling Regarding
17 Rebuttal Testimony Due Dates ("Request for Modification") filed by LAND, et al., and San
18 Joaquin County, et al., on Thursday, June 21, 2018. California Water Research incorporates by
19 reference the Request for Modification, and its supporting exhibits, as if set forth in full herein.
20 California Water Research also joins in the request filed by Contra Costa County, Contra Costa
21 County Water Agency, and Solano County ("Counties") on Monday, June 25, 2018 that the
22 petitioners provide modeling for operations of the WaterFix project, as currently conceived. For
23 the reasons stated therein, the requests should be granted.
24

25 California Water Research also provides further argument in support of these requests.

1 The changes to the WaterFix project in the Supplemental EIR address construction impacts of
2 the project and operational impacts related to the project footprint. The changes to the project
3 footprint are central to key Part 2 hearing issues, namely whether the project will have
4 unreasonable impacts on fish and wildlife. The changes appear to be an attempt to respond to
5 major points raised in Part 2 cross-examination and in protestants' cases in chief, including
6 impacts on black rails and other birds, noise impacts, and air quality impacts. The changes to the
7 project footprint are also relevant to assessment of the impacts of the project on Clifton Court
8 Forebay, LLP, and other legal users of water.

9 The changes to the project to address construction impacts could have been made during
10 the protest resolution phase, and the petition amended before proceeding to a hearing, but
11 petitioners requested that the Hearing Officers skip the protest resolution phase. The Hearing
12 Officers must ensure that granting the petitioners' request to skip the protest resolution phase,
13 and instead allowing petitioners to repeatedly change the project during the course of the
14 hearing, does not result in prejudice to protestants.

15 The Hearing Officer's ruling on February 21, 2018 that there would be a Part 3 of the
16 hearing to consider changes to the project in the Supplemental EIR did address some of the
17 issues of due process under the state and federal constitutions. While the language of the
18 February 21, 2018 hearing ruling specifically addressed the changes to a one tunnel project
19 which appeared likely at the time of the ruling, the Hearing Officer's February 21, 2018 ruling
20 addressed *all* motions for continuance based on changes to the project. California Water
21 Research had moved on February 8, 2018 that the Board "require DWR and Reclamation to
22 formally submit true, correct, and complete information to correct the obsolete information in the
23 Change Petition, and provide at least 60 days for protestants to evaluate the information." The
24 Hearing Officers ruled that the motion was rendered moot by the February 21, 2018 Hearing
25 Ruling and was thereby denied (p. 5.)

1 During presentation of the Department of Water Resources' Case in Chief in Part 2 of the
2 hearing, attorneys for the Department of Water Resources and the State Water Project
3 Contractors also repeatedly raised objections in Part 2 to cross-examination questions that
4 addressed changes to the project, on the basis that the changes would be addressed in Part 3 of
5 the hearing.

6 The Department of Water Resources' sudden proposal to provide testimony on the
7 changes to the project in rebuttal is not consistent with due process, especially given that the June
8 18, 2018 Hearing ruling stated that there may not be surrebuttal. Given the extent of project
9 construction impacts (10,000+ acres), it is also extremely challenging for protestants to identify
10 and adequately analyze new impacts on only three weeks' notice.¹ LAND et. al.'s proposal to
11 modify rebuttal to allow for staggered presentation of cases in chief would address some of these
12 due process concerns, although not all of the concerns expressed in California Sportfishing
13 Protection Alliance et. al.'s April 3, 2018 Motion to Stay or Continue the Hearing, which
14 California Water Research joined.

15 The project Conceptual Engineering Report is currently being revised and is subject to
16 further modification by the Engineering Design Manager, as testified by John Bednarski on
17 cross-examination. The Department of Water Resources' Request for Qualifications NO.
18 10138585, California WaterFix Engineering Design Manager (Exhibit DDJ-254) states that the
19 Engineering Design Manager will "advance the conceptual engineering to set final configuration
20 of the following facilities:"

- 21 a. Tunnel sizes, alignments, and grades and determine location and configuration of all
22 shaft sites and other related appurtenances including access roads and barge landings

23
24 ¹ The changes to the project footprint do affect information provided with the petition application to meet Cal Code
25 Regs Title 23 section 794, which is required under the Board's regulations to be in the petition at time of filing (Cal
26 Code Regs tit 23 § 794(d.)) Notice issues are not cured by information learned during the course of a hearing (*Tafti
v. County of Tulare* (2011) 198 Cal.App. 4th 891, 900.)

- 1 b. Intakes, including sedimentation basin, drying lagoons, conduits, and outlets
2 c. Intermediate forebay with inlet and outlet structures and control
3 d. Forebay near Clifton Court: including conveyance and control facilities to convey
4 water to existing State Water Project (SWP) and CVP facilities
5 e. Pumping plant and surge structures
6 (p. 28-29.)

7 Clearly the final configuration of the WaterFix project has not yet been determined, and
8 the project description in the Supplemental EIR/EIS may also be changed. Given the amount of
9 design work that still needs to be done, it is unclear why the Board's permitting for the project
10 needs to be rushed.

11 There is also an ongoing issue with the CWF H3+ operational scenario that both LAND
12 et. al. and Contra Costa County et. al. raised, in that the WaterFix project has not been authorized
13 by the federal government, and federal participation in the WaterFix project has changed since
14 the Final EIR/EIS was published in December 2016. The Hearing Officers ruled on August 31,
15 2017 that Part 2 of the Hearing could proceed without a Record of Decision, stating:

16 San Joaquin County and others take the position that without the ROD, the State Water
17 Board cannot be assured that Reclamation will abide by the conditions that petitioners
18 have represented will constrain operation of the project. (County of San Joaquin et al.,
19 August 14, 2017, p. 3.) On this point, the objecting parties are mistaken. The State Water
20 Board has the authority through the petition process to define and impose conditions to
21 constrain project operations. Identifying necessary and appropriate conditions for
22 approval of the petition, if the petition is approved, is one of the primary purposes of this
23 hearing. (p. 5, underlining added.)

24 However, it was not known at the time of the Hearing Officers' August 31, 2017 ruling
25 that Reclamation's CVP contractors would vote not to participate in the WaterFix project.
26 Immediately prior to commencement of Part 2 of the hearing, it appeared that the issues of
27 changed project operations due to Reclamation's changed participation would be resolved by the
28

1 Department of Water Resources' submission of updated operations modeling for Part 3. The
2 Hearing Officers ruled on February 21, 2018 to proceed with Part 2, based on changes to project
3 operations being considered in Part 3.

4 The petitioners have since decided not to evaluate changes to project operations in the
5 Supplemental EIR/EIS. As explained below, the Hearing Officers may not be able to resolve the
6 resulting uncertainties in Central Valley Project operations by permit terms.

7 As testified to by Reclamation's witnesses, Reclamation is renegotiating the Coordinating
8 Operating Agreement, which currently requires that the Bureau provide 75% of in-basin storage
9 releases for salinity control during balanced conditions. In the absence of Reclamation's
10 participation in the WaterFix project, it seems highly unlikely that Reclamation will provide
11 these releases. The Board also may not have authority to mandate that Reclamation provide 75%
12 of in-basin storage releases for salinity control, as assumed in the CWF H3+ operational scenario
13 presented in Part 2, and the operational scenarios presented in Part 1. The Racanelli court in
14 *United States v. State Water Resources Board*, 182 Cal.App.3d 82, 134-35 (Cal. App. 1986)
15 elucidated the requirements for consistency of Board permit terms with federal water projects:

16 The court of appeals clarified the test for "consistency" as follows: "[A] state limitation
17 [182 Cal. App. 3d 135] or condition on the federal management or control of a federally
18 financed water project is valid unless it clashes with express or clearly implied
19 congressional intent or works at cross-purposes with an important federal interest served
by the congressional scheme." (694 F.2d at p. 1177.) [citing U.S. v. State of Cal., State
Water Resources (9th Cir. 1982) 694 F.2d 1171 [New Melones II], underlining added.]

20
21 Clearly permit requirements for Reclamation to provide 75% of storage releases for
22 exports by the State Water Project and Metropolitan Water District could be found by a
23 reviewing court to work at cross-purposes to the Central Valley Project. But no other alternative
24 for meeting Bay-Delta water quality requirements and in-basin needs has been analyzed by the
25 petitioners, either in the WaterFix Final EIR/EIS, or in supplemental modeling presented for the

1 hearing. In Decision 990, when the issue of shortages of water supply for the Central Valley
2 Project and the State Water Project permits came up, the Board recessed the hearing and
3 requested that Reclamation and the Department of Water Resources reach a solution (Decision
4 990, Exhibit DDJ-98, p. 58.) The Board needs to do so, and then mandate that the petitioners
5 provided updated modeling of the proposed solution. Again, because the final project
6 configuration has not even been determined, there is no need to rush the permitting.

7 For these reasons, the requests by LAND et. al. and by Contra Costa County et. al. should
8 be granted.

9 Dated June 25, 2018

10 Respectfully submitted,

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13 Deirdre Des Jardins
14 Principal, California Water Research
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1 **STATEMENT OF SERVICE**

2 **CALIFORNIA WATERFIX PETITION HEARING**
3 **Department of Water Resources and U.S. Bureau of Reclamation**
4 **(Petitioners)**

5 I hereby certify that I have this day submitted to the State Water Resources
6 Control Board and caused a true and correct copy of the following document(s):

7 **California Water Research's Joinder in Requests by LAND et. al.**
8 **and San Joaquin County et. al. and by Contra Costa County et. al.**

9 to be served by Electronic Mail (email) upon the parties listed in the Current Service List
10 for the California Water Fix Petition Hearing, dated June 25, 2018, posted by the State
11 Water Resources Control Board at

http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml

12 *Note: In the event that any emails to any parties on the Current Service List are*
13 *undeliverable, you must attempt to effectuate service using another method of service, if*
14 *necessary, and submit another statement of service that describes any changes to the*
15 *date and method of service for those parties.*

16 I certify that the foregoing is true and correct and that this document was executed on
17 June 25, 2018.

18 Signature:



19 Name: Deirdre Des Jardins

20 Title: Principal, California Water Research

21 Party/Affiliation:

22 Deirdre Des Jardins

23 Address:

24 145 Beel Dr

25 Santa Cruz, California 95060

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